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7-5-05
Date

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re patent application of:

Applicant(s): Francis Showering

Examiner: James Smalley

Serial No: 10/009,306

Art Unit: 3727

Filing Date: November 13, 2001

Title: CONTAINER CLOSURE

Mail Stop Appeal Brief – Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPEAL BRIEF

Dear Sir:

Applicant's representative submits this brief in connection with an appeal of the above-identified patent application. A credit card payment form is filed concurrently herewith in connection with all fees due regarding this appeal brief. In the event any additional fees may be due and/or are not covered by the credit card, the Commissioner is authorized to charge such fees to Deposit Account No. 50-1063 [NOVAP100US].

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I. Real Party in Interest (37 C.F.R. §41.37(c)(1)(i))

The real party in interest in the present appeal is Halo Closures, LTD, the assignee of the present application.

II. Related Appeals and Interferences (37 C.F.R. §41.37(c)(1)(ii))

Appellant, appellant's legal representative, and/or the assignee of the present application are not aware of any appeals or interferences which may be related to, will directly affect, or be directly affected by or have a bearing on the Board's decision in the pending appeal.

III. Status of Claims (37 C.F.R. §41.37(c)(1)(iii))

Claims 58-75 are pending in the application. Claims 58-75 stand rejected by the Examiner. The rejections of claims 58-75 are being appealed.

IV. Status of Amendments (37 C.F.R. §41.37(c)(1)(iv))

No claim amendments have been entered after the Final Office Action.

V. Summary of Claimed Subject Matter (37 C.F.R. §41.37(c)(1)(v))**A. Independent Claim 58**

Independent claim 1 recites a container closure assembly, comprising a container mouth and a closure there for, the closure has a top portion with a plurality of segmented lugs depending there from, each of which has a plurality of vertical ridges, the closure comprising an engagement device configured for interlocking with a formation around the mouth to retain the closure on the mouth, and a band for bracing the engagement device to lock it in an engaged condition by resisting outward movement of the engagement device when the band is in a bracing position, characterized in that: the band is movable intact and relative to the engagement device out of the bracing position, and in that the mouth has a larger configuration than the engagement device of the closure in an unstressed condition of the engagement device, such that when the closure is in its operative position on the container mouth after fitting, the engagement device is stressed

10/009,306

BB46457USA

outwardly and the band is maintained in a state of static tension, said tension increasing the bracing effect of the band on the engagement device, and wherein the closure assembly physically interfaces only with a top surface and exterior surfaces of the container mouth. (See, e.g.: page 7, line 5-page 8, line 5; see also, generally, Figures 1-10.)

B. Independent Claim 72

Independent claim 72 recites a container closure assembly, comprising a container mouth and a closure therefor. The closure has a plurality of segmented lugs depending there from, each of which has a plurality of vertical ridges. The closure comprises an engagement device configured for interlocking with a formation around the mouth to retain the closure on the mouth, wherein the closure is in contact only with an exterior surface of the container mouth, and a band for bracing the engagement device to lock it in an engaged condition by resisting outward movement of the engagement device when the band is in a bracing position, characterized by: the mouth having a larger configuration than the engagement device of the closure in an unstressed condition of the engagement device, such that when the closure is in its operative position on the container mouth after fitting, the engagement device is stressed outwardly, co-operating abutment surfaces on the band and the engagement device configured such that: (i) in the unstressed condition of the engagement device, the abutment surfaces are non-interlocking and do not restrict the movement of the band relative to the engagement device, and (ii) in the stressed condition of the engagement device after fitting on the container mouth, the abutment surfaces produce a mechanical interlock between the band and the engagement device in a circumferential direction, to restrict movement of the band relative to the engagement device in the circumferential direction. (See, e.g.: page 7, line 5-page 8, line 5; page 8, line 26-page 9, line 30; page 19, lines 3-28; see also Figures 18 and 22; see also, generally, Figures 1-10.)

C. Independent Claim 73

Independent claim 73 recites a press-fit, lift-off container closure comprising an upper wall, a plurality of wall segments depending from the upper wall, each segment

10/009,306

BB46457USA

having a plurality of vertical ridges thereon, wherein the upper wall and wall segments contact an upper surface of a container mouth and an exterior surface of the container mouth respectively, without contacting an interior surface of the container mouth, an engagement formation on a radially inner face of the side wall or wall segment, and a bracing band for bracing the plurality of wall segments to restrain radial outward movement thereof, characterized in that: the bracing band is integral with the closure and is joined thereto by a plurality of spaced apart frangible connections positioned on each of the vertical ridges, and in that the bracing band is mounted radially outside said plurality of wall segments carrying the engagement formation; the plurality of wall segments is configured to be stressed outwardly from an unstressed condition to a stressed condition when the closure is in its fitted condition on the container mouth; cooperating abutment surfaces are provided on the band and on the plurality of wall segments and configured such that: (i) in the unstressed condition of the plurality of wall segments, the abutment surfaces are non-interlocking and do not restrict movement of the band relative to the plurality of wall segments, and (ii) in the stressed condition of the plurality of wall segments after fitting of the closure on the container mouth, the abutment surfaces produce a mechanical interlock between the band and the plurality of wall segments in a circumferential direction, to restrict movement of the band relative to the plurality of wall segments in the circumferential direction. (See, e.g.: page 7, line 5- page 8, line 5; page 8, line 26-page 9, line 30; page 15, line 27- page 16, line 5; page 19, lines 3-28; see also Figures 18 and 22; see also, generally, Figures 1-10.)

VI. Grounds of Rejection to Be Reviewed (37 C.F.R. §41.37(c)(1)(vi))

A. Claims 58-75 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Bosl *et al.* (U.S. 5,848,717) in view of Ohmi *et al.* (U.S. 5,762,217).

B. Claims 58-75 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Towns *et al.* (U.S. 5,368,178) in view of Ohmi *et al.* (U.S. 5,762,217).

10/009,306

BB46457USA

VII. Argument (37 C.F.R. §41.37(c)(1)(vii))**A. Rejection of Claims 58-75 Under 35 U.S.C. §103(a)**

Claims 58-75 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Bosl *et al.* (U.S. 5,848,717) in view of Ohmi *et al.* (U.S. 5,762,217). It is respectfully requested that this rejection be withdrawn for at least the following reasons. Neither Bosl *et al.* nor Ohmi *et al.*, alone or in combination, teach or suggest every element of the subject claims.

To reject claims in an application under §103, an examiner must establish a *prima facie* case of obviousness. A *prima facie* case of obviousness is established by a showing of three basic criteria. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) *must teach or suggest all the claim limitations*. See MPEP §706.02(j). The *teaching or suggestion to make the claimed combination* and the reasonable expectation of success *must both be found in the prior art and not based on applicant's disclosure*. See *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991) (emphasis added).

The present invention relates generally to container closures, and in particular to container closures for pressurized products, such as pressurized beverages. Independent claim 58 sets forth "A container closure assembly, comprising a container mouth and a closure there for, the closure has a top portion with a plurality of segmented lugs depending there from, each of which has a plurality of vertical ridges, the closure comprising an engagement device configured for interlocking with a formation around the mouth to retain the closure on the mouth...the closure assembly physically interfaces only with a top surface and exterior surfaces of the container mouth." Independent claims 72 and 73 set forth similar aspects. Such aspects of independent claims 58, 72, and 73 are supported by the specification at, for example, Figures 1-7 and related text. As illustrated in Figures 1-7, the closure comprises a top portion having lug segments that depend there from, such that the closure is securely fitted over a rim of a container *without physically contacting an interior surface of the container*. Moreover, the claimed

10/009,306

BB46457USA

aspects facilitate decreasing production costs and device complexity by mitigating a need for a superfluous interface with an interior surface of a container rim. The proposed combination of references fails to teach or suggest each and every aspect set forth in the subject claims.

The Examiner, in the Final Office Action dated February 4, 2005, introduced Bosl *et al.* to teach the aspect of a closure assembly that interfaces with an exterior surface of a container mouth without contacting an interior surface of the container mouth. The Examiner then relies on Ohmi *et al.* to teach various other aspects of the subject independent claims. However, Ohmi *et al.* specifically teaches a container closure that interfaces with an interior surface of the container being sealed in order to effect sealing the container. For instance, "the top panel portion 3 has formed therein an inner ring 8 to be engaged with the inner circumferential side of the mouth portion 5 of the container whereby sealing is carried out in the inner circumferential side of the mouth portion 5 of the container to make the sealing more accurate." (Column 5, lines 62-67.) Thus, Ohmi *et al.* specifically teaches away from a reference that suggests employing a closure that does not contact an interior surface of a container mouth, such as Bosl *et al.*

In the Advisory Action dated April 14, 2005, the Examiner states that Ohmi *et al.* is not relied upon as a base reference, but rather is introduced to teach the aspect of a sealing ring and a segmented container wall in the respective rejections. However, as stated in the Reply to Final Office Action dated February 4, 2005, "*A prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention.*" *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984), emphasis added. Thus, the fact that the Examiner does not combine the interior sealing structure of Ohmi *et al.*, let alone the fact the Ohmi *et al.* is now a secondary reference, is irrelevant because Ohmi *et al.* specifically and solely describes a closure that relies on an abutment to an interior surface of the container being sealed. It appears that the Examiner is picking and choosing elements from the cited references to meet applicant's claimed invention, while disregarding portions of Ohmi *et al.* that lead away from the claimed invention. A reference that teaches away from another reference may not be combined there with to form the basis of a 35 U.S.C. §103 rejection. (See, e.g., *In Re Grasselli*, 713

10/009,306

BB46457USA

F.2d 731, 218 USPQ 769, 779, Fed. Cir. 1983; "It is improper to combine references where the references teach away from their combination.")

Moreover, as detailed above, the subject claims specifically set forth that the claimed container closure does *not* contact an interior surface of the container. Thus, the Examiner's attempt to introduce a new reference that discusses a container cap that contacts only the outside surface of its intended container while maintaining Ohmi *et al.* to suggest other claimed aspects of applicant's invention cannot be construed as anything other than impermissible hindsight. Furthermore, absent some teaching or suggestion in the prior art to combine the elements, it is insufficient to establish obviousness by claiming that the separate elements of the invention existed in the prior art. *Arkie Lures Inc. v. Gene Larew Tackle Inc.*, 43 USPQ2d 1294, 1297 (Fed. Cir. 1997). Thus, a *prima facie* case of obviousness has not been established against the applicant's claimed invention. Further, the subject invention would not have been obvious to one ordinarily skilled in the art sufficient to impel him/her to do what the applicant has suggested, other than *via* employment of applicant's specification as a 20/20 hindsight-based road map to achieve the purported invention.

The Examiner issued a second Advisory Action dated May 26, 2005 to introduce new references in an attempt to rebut arguments set forth in the Reply to the first Advisory Action dated April 14, 2005. Specifically, the Examiner contends that:

"one having ordinary skill in the art would not need to add the plug seal of Ohmi '217 because an equivalent sealing means is already disposed on the cap of Bosl '717... The sealing ring (8) of Ohmi '217 is not required because Bosl '717 appears to already teach a sealing line. Examiner notes Bosl '717 shows an unlabeled liner element in between the sealing cap and bottle neck opening, which appears to be a sealing liner. To support this assertion, the Examiner submits US 6,783,015, by the same inventor (Udo Bosl), which appears to show a similar structure (5), disclosed as a sealing disc. One having ordinary skill would look to Ohmi '217, but realize that an internal sealing ring, such as that of Ohmi '217, is a known equivalent to the sealing liner already present in Bosl '717. Examiner further submits Pohlenz, US 4,658,976, teaching a sealing structure which appears to be structurally identical to that of Bosl '717, including sealing liner (5). Finally, Examiner submits Herr US 4,506,795, teaching in col. 4, lines 20-25 the

10/009,306

BB46457USA

equivalence between the integral plug seal such as that of Ohmi '217, and a sealing liner, such as that of Bosl '717..."

In response to the Examiner's contention that one skilled in the art would disregard the plug seal of Ohmi *et al.* based on an unlabeled sealing disc, applicant's representative respectfully disagrees.

It is essential to consider all elements of the claimed invention; it is impermissible to compare the prior art with what the viewer interprets the "gist" of the invention to be *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 19 USPQ2d 1111 (Fed. Cir. 1991); *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 221 USPQ 669 (Fed. Cir. 1984); *Jones v. Hardy*, 727 F.2d 1524, 1527-28, 220 USPQ 1021m 1024 (Fed. Cir. 1984).

The prior art items themselves must suggest the desirability and thus the obviousness of making the combination without the slightest recourse to the teachings of the patent or application. Without such independent suggestion, the prior art is to be considered merely to be inviting unguided and speculative experimentation which is not the standard with which obviousness is determined. *Amgen, Inc. v. Chugai Pharmaceutical Co. Ltd.*, 927 F.2d 1200, 18 USPQ2d 1016 (Fed. Cir. 1991); *In re Laskowski*, 871 F.2d 115, 117, 10 USPQ2d 1397, 1398 (Fed. Cir. 1989); *In re Dow Chemical Co.*, 837 F.2d 469, 473, 5 USPQ2d 1529, 1532 (Fed. Cir. 1988); *Hodosh v. Black Drug*, 786 F.2d at 1143 n.5., 229 USPQ at 187 n.4.; *In re Gordon*, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1985).

The Examiner's suggestion that what appears to be an unlabeled "sealing liner" of Bosl *et al.* teaches a structure that would indicate to one skilled in the art that the sealing plug of Ohmi *et al.* is not needed amounts to an analysis impermissibly predicated on an endeavor to utilize the applicant's specification as a 20/20 hindsight-based roadmap to achieve the purported combination.

In view of the foregoing, it is respectfully submitted that neither Bosl *et al.* nor Ohmi *et al.*, alone or in combination, make obvious the present invention as set forth in independent claims 58, 72, and 73 (and claims 59-71, 74, and 75, which depend

10/009,306

BB46457USA

respectively there from). Accordingly, withdrawal of this rejection is respectfully requested.

B. Rejection of Claims 58-75 Under 35 U.S.C. §103(a)

Claims 58-75 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Towns *et al.* (U.S. 5,368,178) in view of Ohmi *et al.* (U.S. 5,762,217). It is respectfully requested that this rejection be withdrawn for at least the following reasons. Neither Towns *et al.* nor Ohmi *et al.*, alone or in combination, teach or suggest every element of the subject claims.

The Examiner similarly introduced Towns *et al.* as suggesting a container closure that only contacts an exterior surface of a container, in response to amendment made in the Reply to Office Action dated August 12, 2004. As stated *supra* in Section VII.A, Ohmi *et al.* teaches away from a container closure that contacts *only* an exterior surface of a container mouth, *without contacting an interior surface thereof*. Thus, Ohmi *et al.* is not combinable with Towns *et al.* since combining the references as suggested by the Examiner is a result of impermissibly employing 20/20 hindsight to use applicant's claimed invention as a roadmap to pick and choose elements from the subject references to reject the subject claims. Moreover, and as set forth above with regard to Section VII.A, the Examiner is required to consider Ohmi *et al.* as a whole, including portions that would lead away from applicant's claimed invention, and is not permitted to simply disregard a portion of the reference that teaches away there from.

In view of the foregoing, it is readily apparent that neither Towns *et al.* nor Ohmi *et al.*, alone or in combination, make obvious the present invention as set forth in independent claims 58, 72, and 73 (and claims 59-71, 74, and 75, which depend respectively there from). Accordingly, withdrawal of this rejection is respectfully requested.

C. Conclusion

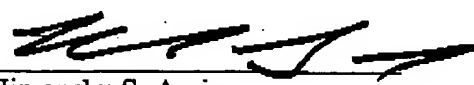
For at least the above reasons, the claims currently under consideration are believed to be patentable over the cited references. Accordingly, it is respectfully requested that the rejections of claims 58-75 be reversed.

10/009,306

BB46457USA

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Commissioner is authorized to charge those fees to Deposit Account No. 50-1063.

Respectfully submitted,
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10/009,306

BB46457USA

VIII. Claims Appendix (37 C.F.R. §41.37(c)(1)(viii))

1-57. (Cancelled)

58. (Previously Presented) A container closure assembly, comprising a container mouth and a closure therefor, the closure has a top portion with a plurality of segmented lugs depending there from, each of which has a plurality of vertical ridges, the closure comprising an engagement device configured for interlocking with a formation around the mouth to retain the closure on the mouth, and a band for bracing the engagement device to lock it in an engaged condition by resisting outward movement of the engagement device when the band is in a bracing position; characterized in that:

the band is movable intact and relative to the engagement device out of the bracing position, and in that the mouth has a larger configuration than the engagement device of the closure in an unstressed condition of the engagement device, such that when the closure is in its operative position on the container mouth after fitting, the engagement device is stressed outwardly and the band is maintained in a state of static tension, said tension increasing the bracing effect of the band on the engagement device, and wherein the closure assembly physically interfaces only with a top surface and exterior surfaces of the container mouth.

59. (Previously Presented) An assembly according to claim 58, wherein in an operative position of the closure on the container mouth and prior to the first time the closure is removed, the band is integrally coupled to the closure by a plurality of integral frangible connections.

60. (Previously Presented) An assembly according to claim 59, wherein the frangible connections are collapsible without shearing, to permit limited outward deformation of the engagement device.

10/009,306

BB46457USA

61. (Previously Presented) An assembly according to claim 58, a frangible connection is positioned on each of the plurality of vertical ridges on the segmented lugs of the closure facing the band.

62. (Previously Presented) An assembly according to claim 58, wherein the container mouth has a lateral dimension of at least 4 cm.

63. (Previously Presented) An assembly according to claim 58, wherein the container and closure are able to withstand an internal pressure of at least 60 psi.

64. (Previously Presented) An assembly according to claim 58, further comprising co-operating abutment surfaces for producing at least one mechanical interlock between the bracing band and the engagement device for communicating tension in the bracing band to the engagement device.

65. (Previously Presented) An assembly according to claim 58, wherein the engagement device is segmented.

66. (Previously Presented) An assembly according to claim 58, wherein the engagement device comprises one or more lugs which engage one or more undercuts adjacent to the container mouth.

67. (Previously Presented) An assembly according to claim 66, wherein the undercut comprises a rim around the container mouth.

68. (Previously Presented) An assembly according to claim 66, wherein at least one said lug comprises a locking projection, the locking projection comprising a lead-in ramp surface, and an abutment surface.

10/009,306

BB46457USA

69. (Previously Presented) An assembly according to claim 68, wherein the abutment surface is inclined at an angle whose magnitude is less than that of the inclination of the ramp surface.

70. (Previously Presented) An assembly according to claim 58, wherein the closure is formed of plastics.

71. (Previously Presented) An assembly according to claim 58, wherein the closure is refittable to the container mouth after it has been removed for the first time.

72. (Previously Presented) A container closure assembly, comprising a container mouth and a closure therefor, the closure has a plurality of segmented lugs depending there from, each of which has a plurality of vertical ridges, the closure comprising an engagement device configured for interlocking with a formation around the mouth to retain the closure on the mouth wherein the closure is in contact only with an exterior surface of the container mouth, and a band for bracing the engagement device to lock it in an engaged condition by resisting outward movement of the engagement device when the band is in a bracing position; characterized by:

the mouth having a larger configuration than the engagement device of the closure in an unstressed condition of the engagement device, such that when the closure is in its operative position on the container mouth after fitting, the engagement device is stressed outwardly,

co-operating abutment surfaces on the band and the engagement device configured such that:

(i) in the unstressed condition of the engagement device, the abutment surfaces are non-interlocking and do not restrict the movement of the band relative to the engagement device, and

(ii) in the stressed condition of the engagement device after fitting on the container mouth, the abutment surfaces produce a mechanical interlock between the band and the engagement device in a circumferential direction, to restrict movement of the band relative to the engagement device in the circumferential direction.

10/009,306

BB46457USA

73. (Previously Presented) A press-fit, lift-off container closure comprising an upper wall, a plurality of wall segments depending from the upper wall, each segment having a plurality of vertical ridges thereon, wherein the upper wall and wall segments contact an upper surface of a container mouth and an exterior surface of the container mouth respectively, without contacting an interior surface of the container mouth, an engagement formation on a radially inner face of the side wall or wall segment, and a bracing band for bracing the plurality of wall segments to restrain radial outward movement thereof; characterized in that:

the bracing band is integral with the closure and is joined thereto by a plurality of spaced apart frangible connections positioned on each of the vertical ridges, and in that the bracing band is mounted radially outside said plurality of wall segments carrying the engagement formation;

the plurality of wall segments is configured to be stressed outwardly from an unstressed condition to a stressed condition when the closure is in its fitted condition on the container mouth;

cooperating abutment surfaces are provided on the band and on the plurality of wall segments and configured such that:

(i) in the unstressed condition of the plurality of wall segments, the abutment surfaces are non-interlocking and do not restrict movement of the band relative to the plurality of wall segments, and

(ii) in the stressed condition of the plurality of wall segments after fitting of the closure on the container mouth, the abutment surfaces produce a mechanical interlock between the band and the plurality of wall segments in a circumferential direction, to restrict movement of the band relative to the plurality of wall segments in the circumferential direction.

74. (Previously Presented) A closure according to claim 73, wherein the band is mounted for hinged movement relative to the closure upon shearing of the frangible connections.

10/009,306BB46457USA

75. (Previously Presented) A closure according to claim 73, wherein the frangible connections are collapsible without shearing to permit limited outward deformation of the plurality of wall segments.

76. (Cancelled)

77. (Cancelled)

IX. Evidence Appendix (37 C.F.R. §41.37(c)(1)(ix))

None.

X. Related Proceedings Appendix (37 C.F.R. §41.37(c)(1)(x))

None.